

NOTE by Assistant, 19 Oct. This document has been reformatted only to contain all the attachments associated with this motion. XXXX, 18 Oct 2004.

UNITED STATES

v.

SALIM AHMED HAMDAN

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)
) DEFENSE REQUEST FOR
) WITNESS IN MOTION HEARING
) ON SEPARATION OF
) POWERS/EQUAL PROTECTION
) BRUCE ACKERMAN
)
) 18 October 2004
)

1. Witness Request – Bruce Ackerman – U.S. v. Hamdan.

2. Bruce Ackerman is Sterling Professor of Law, Yale Law School. His address is XXXX. His telephone number is XXXX. His e-mail is XXXX. He speaks English.

3. Bruce Ackerman is one of, if not the, leading scholar on the meaning of the United States Constitution. He has written widely in the areas of separation of powers and equal protection, including several articles regarding military commissions and the Constitution's guarantees in wartime. He will explain why the law, particularly the United States Constitution, forbids the trial of Mr. Hamdan by military commission.

4. Civilian defense counsel has spoken with Professor Ackerman and has read his publications.

5. The testimony of Professor Ackerman is to be used for Mr. Hamdan's motions: Equal Protection Clause (D19), 42 U.S.C. 1981 (D18), and Lack of Legislative Authority (D20). It will also be referenced in the Defense Motion for Abatement (D16).

6. Civilian defense counsel had met face-to-face with Professor Ackerman on 7 October 2004, and Professor Ackerman indicated that he will be available on 10 November 2004 to testify.

7. Civilian defense counsel believes that the commission would greatly benefit from the live testimony of Professor Ackerman. In particular, Professor Ackerman, as one of the leading experts on the American Constitution, would be in a position to react to the arguments advanced in the proceedings by both sides as to the constitutional and legal justification, if any, for the military commission. There simply is no greater authority in the world than Professor Ackerman when it comes to these questions. Further, the Defense does not agree to an alternative to live testimony as the issues are case dispositive and we cannot possibly contemplate all questions the Commission Members may have.

8. No other witness can be called to attest to the constitutional status of military commissions throughout American history, particularly as it relates to Congressional authorization, the role of the Commander-in-Chief in national security emergencies, and notions of equality. Professor Ackerman is the leading expert in the field.

9. This is an expert witness request. His views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire commission against the influence of the sole member of the commission who has a law degree. We do not mean to suggest that that individual is likely to rule one way or the other, rather, we simply point out that providing the commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the commission is essential to providing the full commission with the information necessary to make an informed decision. In this respect, the commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

NEAL KATYAL
Civilian Defense Counsel

Attachments:

1. Defense Request for Expert Witness – Bruce Ackerman – 11 Oct 04
2. Defense Response to Prosecution Motion Barring Expert Witnesses, 14 Oct 04

UNITED STATES

v.

SALIM AHMED HAMDAN

)
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) DEFENSE REQUEST FOR
) WITNESS IN MOTION HEARING
) ON SEPARATION OF
) POWERS/EQUAL PROTECTION
) BRUCE ACKERMAN
)
) 11 October 2004
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1. Witness Request – BRUCE ACKERMAN – U.S. v. Hamdan.

2. Bruce Ackerman is Sterling Professor of Law, Yale Law School. His contact information is set forth on his curriculum vitae, which has already been provided to the commission.

3. Bruce Ackerman is one of, if not the, leading scholar on the meaning of the United States Constitution. He has written widely in the areas of separation of powers and equal protection, including several articles regarding military commissions and the Constitution's guarantees in wartime. He will explain why the law, particularly the United States Constitution, forbids the trial of Mr. Hamdan by military commission. He is not only an expert on the law, he is also an expert on American history and the role of the President as Commander in Chief.

4. Civilian defense counsel has spoken with Professor Ackerman and has read his publications.

5. The testimony of Professor Ackerman is to be used for Mr. Hamdan's motions: Equal Protection Clause, 42 U.S.C. 1981, and Separation of Powers.

6. Civilian defense counsel had met face-to-face with Professor Ackerman on 7 October 2004, and Professor Ackerman indicated that he will be available on 10 November 2004 to testify.

7. Civilian defense counsel believes that the commission would greatly benefit from the live testimony of Professor Ackerman. In particular, Professor Ackerman, as one of the leading experts on the American Constitution, would be in a position to react to the arguments advanced in the proceedings by both sides as to the constitutional and legal justification, if any, for the military commission. There simply is no greater authority in the world than Professor Ackerman when it comes to these questions. Further, the Defense does not agree to an alternative to live testimony as the issues are case dispositive and we cannot possibly contemplate all questions the Commission Members may have.

8. No other witness can be called to attest to the constitutional status of military commissions throughout American history, particularly as it relates to Congressional authorization, the role of the Commander-in-Chief in national security emergencies, and notions of equality. Professor Ackerman is the leading expert in the field. He has testified before Congress during the impeachment of President Clinton, along with numerous other bodies.

9. This is an expert witness request. His views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire commission against the influence of the sole member of the commission who has a law degree. We do not mean to suggest that that individual is likely to rule one way or the other, rather, we simply point out that providing the commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the commission is essential to providing the full commission with the information necessary to make an informed decision. In this respect, the commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

Neal Katyal
Civilian Defense Counsel

Note:

The Defense also included its reply to the Prosecution Motion to Barring Expert witnesses.

A copy of that document is the same as Motions Inventory number P8 and is also an attachment to Motions Inventory D24.

The document referred to above has been removed from this file solely for purposes for economy and because it is already a part of the record.

XXXX

Assistant to the Presiding Officer.

BRUCE ARNOLD ACKERMAN

Curriculum Vitae

Date of Birth: XXXX

Marital Status: XXXX

Present Position: Sterling Professor of Law and Political Science, Yale University, July 1, 1987 -

Past Positions:

- (1) Law Clerk, Judge Henry J. Friendly, U.S. Court of Appeals, 1967-8
- (2) Law Clerk, Justice John M. Harlan U. S. Supreme Court, 1968-9
- (3) Assistant Professor of Law, University of Pennsylvania Law School, 1969-71
- (4) Visiting Assistant Professor of Law and Senior Fellow, Yale Law School, 1971-72
- (5) Associate Professor of Law & Public Policy Analysis, University of Pennsylvania, 1972-73
- (6) Professor of Law and Public Policy Analysis, University of Pennsylvania, 1973-74
- (7) Professor of Law, Yale University, 1974-82
- (8) Beekman Professor of Law and Philosophy, Columbia University, 1982-87

Education:

- (1) B.A. (summa cum laude), Harvard College, 1964
- (2) LL.B. (with honors), Yale Law School, 1967

Languages: German, Spanish, French

Professional Affiliations: Member, Pennsylvania Bar; Member, American Law Institute

Fields: Political philosophy, American constitutional law, comparative law and politics, taxation and welfare, environmental law, law and economics, property.

Honors: American Philosophical Society, Henry Phillips Prize in Jurisprudence ("for

lifetime achievement”); Fellow, American Academy of Arts and Sciences; Fellow, Collegium Budapest, Fall 2002; Fellow, Center for Advanced Study in the Behavioral Sciences, Spring 2002; Fellow, Woodrow Wilson Center, 1995-96; Fellow, Wissenschaftskolleg, Berlin 1991-92; Guggenheim Fellowship, 1985-86, Rockefeller Fellow in the Humanities, 1976-7; 1982 Henderson Prize of the Harvard School for *The Uncertain Search for Environmental Quality* as the best book on "law and government published during the years 1972 through 1980"; 1981 Gavel Award of the American Bar Association for *Social Justice in the Liberal State*.

Other Awards

and Positions: 2001-02 Jorde Lecture, Yale University and University of California, Berkeley; 2000 Moffett Lecture, Princeton University; 1999 Marks Lecture, University of Arizona; 1999 Terrell Lecture, University of Texas; 1997 Hart Lecture, Georgetown University Law School; 1996 McCorkle Lecture, University of Virginia; 1994 Order of the Coif, Inaugural Lecture, University of California, Berkeley; 1993 University of Connecticut Law Review Award; 1990 Friedrich Lecture, Harvard University; 1987 Leary Lecture, University of Utah; 1986 Currie Lecture, Duke University; 1984 Harris Lecture, University of Indiana; 1983 Storrs Lecture, Yale University.

Kyoto Seminar in American Studies, July, 2000; Visiting Professor, University of Rome, May, 1984; Research Scholar, International Institute for Applied Systems Analysis, Vienna, Austria, Summer 1982; Visiting Professor, Environmental Protection Agency, May 1979.

Grants from National Science Foundation, Council on Law Related Studies.

Order of the Coif; Phi Beta Kappa.

Publications:

I. Books:

1. *The Uncertain Search for Environmental Quality* (with Rose-Ackerman, Sawyer and Henderson), Free Press: 1974
2. *Private Property and the Constitution*, Yale University Press: 1977.
3. *Social Justice in the Liberal State*, Yale University Press: 1980. Italian: Il Mulino, 1984; Spanish: Centro de Estudios Constitucionales, 1993.
4. *Clean Coal/Dirty Air* (with Hassler) Yale University Press: 1981.

5. *Reconstructing American Law*, Harvard University Press: 1984. Spanish: *Del Realismo Al Constructivismo Juridico*, Ariel: (1989)
6. *We the People*, Vol 1: *Foundations*, Harvard University Press: 1991. French: *Au Nom du Peuple*, Calmann-Levy, 1998.
7. *The Future of Liberal Revolution*, Yale University Press: 1992. German: *Ein neuer Anfang fuer Europa*, Siedler: 1993. Spanish: Ariel, 1995. Polish: Terminus, 1996.
8. *Is NAFTA Constitutional?* (with David Golove), Harvard University Press: 1995.
9. *We the People*, Vol 2: *Transformations*, Harvard University Press: 1998.
10. *The Case Against Lameduck Impeachment*, Seven Stories Press: 1999.
11. *The Stakeholder Society* (with Anne Alstott), Yale University Press: 1999. (German translation: Campus, 2001)
12. *La Politica del Dialogo Liberal*, Gedisa: 1999
13. *Voting with Dollars* (with Ian Ayres), Yale University Press: 2002.
14. *Deliberation Day* (with James Fishkin), in progress.
15. *America On the Brink*, in progress.

II. Edited Volumes

1. Editor, *Economic Foundations of Property Law*, Little Brown: 1975 (2d ed. with Robert Ellickson and Carol Rose, 1995; 3rd ed. 2002).
2. Editor, *Bush v. Gore: The Question of Legitimacy*, Yale University Press: 2002.

III. Articles:

1. Regulating Slum Housing Markets on Behalf of the Poor, *Yale Law Journal*, vol. 80, pp. 1093-1197 (1971)

2. More on Slum Housing and Redistribution Policy, *Yale Law Journal*, vol. 82, pp. 1194-1207 (1973)
3. The Uncertain Search for Environmental Policy: Part I with James Sawyer), *University of Pennsylvania Law Review*, vol. 120, pp. 419-503 (1972); Part II (with Rose-Ackerman and Henderson), *University of Pennsylvania Law Review*, vol. 121, pp. 1225-1308 (1973).
4. Law and the Modern Mind, *Daedalus*, pp. 119-131 (1974)
5. The Jurisprudence of Just Compensation, *Environmental Law*, vol. 7, pp. 509-519 (1977)
6. The Structure of Subchapter C: An Anthropological Comment, *Yale Law Journal*, vol. 87, pp. 436-446 (1977)
7. Four Questions for Legal Theory, *Nomos*, vol. 22, pp. 351-375 (1980)
8. Beyond the New Deal: Coal and the Clean Air Act (with William Hassler), *Yale Law Journal*, vol. 89, pp. 1466-1571 (1980)
9. The Marketplace of Ideas, *Yale Law Journal*, vol. 90, pp. 1131-1148 (1981)
10. Beyond the New Deal: Reply (with William T. Hassler), *Yale Law Journal*, vol. 90, pp. 1412-1434 (1981)
11. What is Neutral about Neutrality?, *Ethics*, vol. 93, pp. 372-390 (1983)
12. On Getting What We Don't Deserve, *Social Philosophy and Policy*, vol. 1, pp. 60-70 (1983)
13. Foreword: Law in an Activist State, *Yale Law Journal*, vol. 92, pp. 1-45 (1983) (Dutch: Het recht in een activistische staat, *Staatkundig jaarboek, 1983-1984*, pp. 313-328, Leiden, December 1983).
14. Canada at the Constitutional Crossroads (with Robert Charney), *University of Toronto Law Journal*, vol. 34, pp. 117-135 (1984)
15. Storrs Lectures: Discovering the Constitution, *Yale Law Journal*, vol. 93, pp. 1013-1072 (1984)

16. Beyond Carolene Products, *Harvard Law Review*, vol. 98, pp. 713-46 (1985)
17. Toward a Theory of Statutory Evolution: The Federalization of Environmental Law (with Donald Elliott and John Millian), *Journal of Law, Economics, Organization*, Vol. 1, pp. 313-340 (1985)
18. Foreword: Talking and Trading, *Columbia Law Review*, vol. 85, pp. 899-903 (1985)
19. Cost Benefit and the Constitution, in Roger Noll (ed.), *Regulatory Policy and the Social Sciences*, pp. 351-357 (1985)
20. Reforming Environmental Law (with Richard Stewart), *Stanford Law Review*, vol. 37, pp. 1333-1365 (1985)
21. Deux Sortes de Recherches en Droit et Economie, in *Revue de la Recherche Juridique: Droit Prospectif* (Presses Universitaires d'Aix-Marseille: 1986)
22. Law, Economics, and the Problem of Legal Culture, *Duke Law Journal*, vol. 6, pp 929-947 (1986) (Italian: *Rivista Critica di Diritto Privato*); (German: Schäfer and Wehrt eds., *Die Ökonomisierung der Sozialwissenschaften* [Campus: 1988]).
23. Neo-Federalism? in Jon Elster (ed.), *Constitutionalism and Democracy* (Cambridge Univ. Press: 1988)
24. Transformative Appointments, *Harvard Law Review*, vol. 101, pp. 1164-1184 (1988)
25. Why Dialogue?, *Journal of Philosophy*, vol. 86, pp. 5-22 (1989) (Italian: *Teoria Politica* (1989); German: *Akten Des 12, Internationalen Wittgenstein Symposiums* pp. 25-35 (1988)); Dutch: Von den Brink & Von Reijen, *Het Recht Van De Moraal* pp. 67-84 (1994); Spanish: *Metapolitica* vol. 2, no. 6, pp. 207-22 (1998)).
26. Reforming Environmental Law : The Democratic Case for Market Incentives, *Columbia Journal of Environmental Law* (with Richard Stewart) vol. 13, pp. 171-199 (1988)
27. Neutralities, in *Liberalism and the Good* (ed. by Douglass, Mara, & Richardson) pp. 29-43 (1990).

28. Constitutional Politics/Constitutional Law, *Yale Law Journal*, vol. 89, pp. 453-546 (1989).
29. Robert Bork's Grand Inquisition, *Yale Law Journal*, vol. 92 pp. 1419-39 (1990); The Grand Inquisitor, *The American Prospect*, vol. 1, no. 2, pp. 106-114 (1990).
30. The Common Law Constitution of John Marshall Harlan, *New York Law School Law Review*, vol 36, pp. 5-32 (1991).
31. Die Zukunft der Liberalen Revolution, *Die Neue Gesellschaft/Frankfurter Hefte*, vol. 39, no. 3. pp.221-231 (1992).
32. The Lost Opportunity, in *Tel Aviv University Studies in Law*, vol 10, pp. 53-68 (1991).
33. Liberating Abstraction, *U. of Chicago Law Review*, vol. 59, pp. 317-348 (1992); reprinted in Stone, Epstein, & Sunstein, *The Bill of Rights in the Modern State* pp. 317-348 (U. Chi. Press, 1992).
34. Von der Revolution zur Verfassung, *Transit: Europäische Revue*, vol. 4, pp. 46-61 (1992)
35. Crediting the Voters: A New Beginning for Campaign Finance, *American Prospect* pp. 71-80 (Spring, 1993). (Italian: *Politica del Diritto*, vol. 24, pp. 647-664 (1993)); reprinted in Burnham, *The American Prospect: Reader in American Politics*, pp. 218-31 (1994)
36. Rooted Cosmopolitanism, *Ethics*, vol. 104, pp. 516-35 (1994).
37. Higher Lawmaking, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (ed. Sanford Levinson), pp. 63-87 (Princeton University Press, 1995).
38. Political Liberalisms, *Journal of Philosophy*, vol. 91, pp. 364-86 (1994)
39. The Political Case for Constitutional Courts, in, *Liberalism Without Illusions* (ed. Bernard Yack) pp. 205-19 (U. Chi. Press, 1995)
40. La démocratie dualiste, *1789 et l'Invention de la Constitution* (eds. Michel Troper and Lucien Jaume) pp. 191-204 (LGDJ-Bruylant, 1994)

41. Is NAFTA Constitutional? (with Golove) *Harvard Law Review*, vol. 108, pp. 799-929 (1995).
42. Our Unconventional Founding, (with Katyal) *University of Chicago L. Rev.* vol. 62, pp. 475 ff. (1995).
43. The Next American Revolution in Austin Sarat ed. *Identities, Politics and Rights*, pp. 403-23 (University of Michigan Press, 1995)
44. An Open Letter to Congressman Gingrich, (endorsed by 16 other law professors), *Yale Law Journal*, vol. 104, pp. 1539-44 (1995).
45. A Generation of Betrayal? *Fordham Law Review*, vol. 45, pp. 1519-36 (1997).
46. The Rise of World Constitutionalism, *University of Virginia Law Review*, vol. 83, pp. 771-797 (1997) [reprinted as *Dean's Occasional Paper*, *Yale Law School*(October, 1997)]; Chinese: Nanjing Univ. Law Rev. 10-27 (2001).
47. Temporal Horizons of Justice, *Journal of Philosophy*, vol. 94, pp. 299-317 (1997).
48. The Broken Engine of Progressive Politics, *The American Prospect*, pp. 34-43 (May-June 1998)
49. Testimony Before the U.S. House Judiciary Committee on the Impeachment of President Clinton, 32 *PS [Political Science and Politics]* pp. 24, 29-31 (March 1999)
50. Taxation and the Constitution, *Columbia Law Review* vol.99, pp. 1-67 (1999).
51. Revolution on a Human Scale, *Yale Law Journal* vol.108, pp.2279-2349 (1999).
52. Should Opera Be Subsidized? and Riposte: Lighten Up! *Dissent* 89 (Summer 1999).
53. Your Stake in America (with Anne Alstott), 41 *Arizona L. Rev.* 249 (1999).
54. Constitutional Economics/Constitutional Politics,10 *Constitutional Political Economy* 415(1999)

55. O Novo Constitucionalismo Mundial, in Margarida Maria Lacombe Camargo, 1988-1998, Uma Decada de Constituicao (1999).
56. The New Separation of Powers, *Harvard Law Review* vol.113, pp.633-729 (2000). (Italian: Carocci (2003))
57. \$80,000 and a Dream: A Simple Plan for Generating Equal Opportunity, *The American Prospect* pp. 25-27 (July 17, 2000) (with Anne Alstott).
58. A Revised Opinion for Brown v. Board of Education, in Jack Balkin ed., *What Brown v. Board of Education Should Have Said*, pp. 100-23 (NYU Press: 2001).
59. Off-Balance, in Bruce Ackerman ed., *Bush v. Gore: The Question of Legitimacy* (Yale Univ. Press: 2002).
60. Deliberation Day, *Journal of Political Philosophy* , vol. 10, pp. 129-52 (2002) (with James Fishkin).
61. The New Paradigm Reconsidered, *Calif. L. Rev.*, forthcoming (with Ian Ayres).

IV. Occasional Pieces:

1. Clean (Cough) Air, *New York Times*, Op-Ed page, August 30, 1977.
2. Unconstitutional Convention, *New Republic*, March 3, 1979.
3. Air-Pollution 'Rights' (with Donald Elliott), *New York Times*, Op-Ed page, September 11, 1982.
4. Commencement Remarks to the Yale Class of 1980, *Yale Law Report*, Spring/Summer 1982.
5. The Languages of Power: Reflections on the Changing Relationship Between the Law and the Social and Humane Sciences, *Proceedings of 1982-1983, Columbia Committee on General Education* (vol. 11).
6. Agon (In Memoriam: Arthur Leff), *Yale Law Journal*, vol. 91, pp. 219-223 (1982).
7. In Memoriam: Henry J. Friendly, *Harvard Law Review*, Vol. 99,

No. 8, June 1986.

8. Proceedings of Conference on Takings of Property and the Constitution, *Miami Law Review*, vol. 41, No. 1, pp. 49-222, passim (1986).
9. Interview, Bruce Ackerman over sociale rechtvaardigheid, de rol van de rechter en 'law and economics', by M.A.P. Bovens and W.J. Witteveen, *Staatkundig Jaarboek*, pp 255-278 (1987).
10. Das Gauck Behoerde: Zwei Fragen, in Hassemer & Starzacher, *Datenschutz und Stasi-Unterlagen: Verdraengen oder Bewaeltigen?* (1993).
11. 1787 and 1993, *New York Times*, Op-Ed page, April 3, 1993.
12. Reforming Campaign Reform, *Wall Street Journal*, Op-Ed page, April 26, 1993.
13. We the People--and Congress--Have Yet To Be Heard (with Harold Koh), *Los Angeles Times*, Op-Ed page, May 5, 1993.
14. Let's Introduce a New Political Currency System to Restore the Sovereign Citizenry in Japan (with Norikazu Kawagishi), *Asahi Shimbun (Tokyo)*, Op-Ed page, September 28, 1993.
15. Gingrich v. The Constitution, *New York Times*, Op-Ed page, December 10, 1994.
16. Joint Letter on the Constitutionality of the World Trade Organization and the Uruguay Round, Hearings before the Senate Committee on Commerce, Science and Transportation, S. 2467, GATT Implementing Legislation, S. Hrg. 103-823, pp. 529-31 (1994).
17. The Patriot Option, *The Boston Review*, pp. 13-14 (April/May 1997)
18. Historical Perspective [on Presidential Impeachment], Letters to the Editor, *New York Times*, February 2, 1998, p. A-22.
19. Welfare for Wagner?, Project Syndicate [syndicated column for numerous European newspapers], May-June 1998 [on subsidizing the opera]. A longer version of the same essay was published in the Newsletter of the Institut fuer die Wissenschaften vom Menschen,

Feb-April 1998, as “Subsidize the Opera?”

20. Euro Follows American Example, Letters to the Editor, *New York Times*, May 2, 1998, p. A-14.
21. What Ken Starr Neglected to Tell Us, Op-Ed, *New York Times*, September 14, 1998.
22. Without the People, Impeachment Fails, Op-Ed, *Los Angeles Times*, November 6, 1998.
23. Lameduck Impeachment? Not So Fast, Op-Ed, *New York Times*, December 8, 1998.
24. Contest Lane-duck House Vote, Op-Ed, *USA Today*, p.12A, December 23,1998.
25. This Lane-Duck Impeachment Should Die, Op- Ed, *Washington Post*, p. A17, December 24, 1998.
26. Reply to Professor Tribe, January 8, 1999, at www.lawnewsnetwork/opencourt
27. An Unconstitutional Republican Exit Strategy, *Los Angeles Times*, p. B7, February 3, 1999.
28. How \$50 Can Beat Big Money Campaigns, *Los Angeles Times*, p. B7, October 18, 1999.
29. \$80,000 and a Dream (with Anne Alstott), *The American Prospect*, pp. 23-25, July 17, 2000.
30. As Florida Goes..., *New York Times*, Op-Ed, p. A-33, December 12, 2000
31. Keep Election Fixes to Middle Ground, *Los Angeles Times*, p. 7 December 18, 2000
32. The Court Packs Itself, *The American Prospect*, p. 42, February 12, 2001
33. Anatomy of a Constitutional Coup, *London Review of Books*, pp. 3-7, February 8, 2001. Translation: *Le Monde*, p. 18, February 27, 2001.
34. Foil Bush’s Maneuvers for Packing Court, *Los Angeles Times*, Op-

Ed, p. B11, April 26, 2001.

35. Bush's Alarming Race Against the Clock, *Boston Globe*, *Op-Ed*, April 29, 2001.
36. Tony Blair's Big Idea, *New York Times*, *Op-Ed*, Sec. 4, p. 15, May 6, 2001 (with Anne Alstott).
37. Treaties Don't Belong to Presidents Alone, *New York Times*, p. A 23, August 29, 2001.
38. Sunset Can Put a Halt to Twilight of Liberty, *Los Angeles Times*, p. B 11, September 20, 2001.
39. On the Home Front, A Winnable War, *New York Times*, p. A 21, November 6, 2001.
40. Bush Can't Operate as a One-Man Act, *Los Angeles Times*, December 16, 2001.
41. War is Handy Politics for Bush, *Los Angeles Times*, p. M 5, February 3, 2002.
42. Don't Panic, *London Review of Books*, pp. 15-16, February 7, 2002. German version: *Frankfurter Rundschau*, February 15, 2002.
43. Bush Must Avoid Shortcuts on Road to War, *Los Angeles Times*, p. 15, May 31, 2002.
44. Campaign Reform's Worst Enemy, *New York Times*, p. 13, July 6, 2002 (with Ian Ayres).
45. But What's the Legal Case for Preemption?, *Washington Post*, p. B2, August 18, 2002.
46. The Legality of Using Force, *New York Times*, p. A15, September 21, 2002.
47. Episode oder Epoche, *Frankfurter Rundschau*, Feuilleton, October 16, 2002.
48. Facing the Threat From North Korea, *Washington Post*, Letters to the Editor, p. A22, October 19, 2002.
49. Government by Half-Truth, *The American Prospect* (web

exclusive), October 24, 2002.

V. Recent Professional Activities:

Lead counsel, with Lloyd Cutler, in *Skaggs v. Carle*, a challenge by 28 Representatives to the constitutionality of new House rules requiring supermajorities for the enactment of tax increases. 110 F3d 831 (D.C. Cir. 1997).

Witness on Behalf of President Clinton, Impeachment Hearings before the House Judiciary Committee, December, 1998.

Drafting Committee, Amicus Brief of 100 Law Professors in *U.S. v. Morrison*, in support of the constitutionality of the Violence Against Women Act, November, 1999.

Testimony on the Appointment of Electors, Delivered to the Special Joint Committee of the Florida Legislature, November 29, 2000.

Testimony on the Appointment of Electors, Delivered to Special Committees of the House and Senate of the State of Florida, December 11, 2000

D26 Hamdan Defense Supplement. 21 Oct 04.

Please find, as per your request, a more detailed synopsis of the testimony. The synopsis also explains why live testimony is important, from the witness's perspective. I have separately, in our motion under POM #10, explained why we believe the witness' testimony is important from the perspective of the Defense, including the need to ensure that the Presiding Officer does not unduly influence the proceedings as the only lawyer. These concerns are at their height given the decision today by the appointing authority to reduce the size of the commission to three members, meaning that the specter of undue influence by the Presiding Officer (which would, as we have said, be unintentional yet predictable) is at its height.

Synopsis of Testimony Professor Bruce Ackerman

Professor Ackerman is Sterling Professor of Law and Political Science. He is a member of the American Law Institute, and the recipient of the American Philosophical Society's Henry Phillips Prize for lifetime achievement in Jurisprudence.

This Award, which has been granted only twenty times in more than a century, singled out for special commendation Professor Ackerman's two volume work on the Constitution, *We the People*. Professor Ackerman proposes to bring this work, which analyzes the role of the separation of powers at times of crisis, to bear on his analysis of the constitutionality of President Bush's order on military commissions as applied to Mr. Hamdan. He will argue that precedents generated during the Civil War and Second War, are not properly interpreted as applicable to the distinctive problems arising in the present conflicts.

He also proposes to use his recent essay on 'The Emergency Constitution,' 113 *Yale Law Journal* 1029-1091 (2004), as a supplementary framework for analyzing the fundamental constitutional issues involved. This essay has already been recognized as a basic contribution to the field in a Symposium published in the June 2004 issue of the *Yale Law Journal*.

Professor Ackerman has not yet published anything bringing these historical and constitutional analyses to bear on the current problem, and so his testimony on the separation of powers will provide the military commission with constitutional perspectives that cannot readily be obtained in standard legal publications. His testimony is directly relevant to this commission, in that it will explain why Mr. Hamdan is facing a military commission that is not justified in American history or its Constitution. Because the history spans over 200 years, oral testimony is particularly important so that Professor Ackerman can tailor his presentation to questions about time periods of specific interest to the Commission Members.

Professor Ackerman will also argue that the President's Order violates the equal protection clause in exempting citizens from the jurisdiction of the military commissions. Both citizens and non-citizens are equally capable of committing war crimes, and the decision to try these offenses under two entirely different procedures lacks the rational basis required by the Equal Protection Clause. The decision is particularly invidious, and requires more strict scrutiny, when it exempts citizens who might otherwise use the democratic process to insist on reform of the military commission's procedures. This argument builds on Professor Ackerman's scholarly work on the equal protection clause, most notably his essay, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985). A Lexis search reveals that this essay has been a reference point in the scholarly literature, with 288 citations to its credit. Once again, there is no scholarly essay applying Professor Ackerman's doctrinal arguments to the case at hand. His testimony will provide the commission with a unique opportunity to consider the charges against Mr. Hamdan and their standing under the Constitution.

UNITED STATES OF AMERICA

V.

SALIM AHMED HAMDAN

PROSECUTION RESPONSE TO
DEFENSE REQUEST FOR
WITNESS: BRUCE ACKERMAN

25 October 2004

The Prosecution in the above-captioned case hereby files the following response and notification of intent not to produce in accordance with paragraph 6 of POM 10. In support of this response, the Prosecution answers the Defense's Request for Witness as follows:

1. Response to paragraph 2. The Prosecution has no objections or supplements to this paragraph.
2. Response to paragraph 3. The Prosecution does not contest the content of the proffer. However, the Defense must assert why the witness' *testimony* will be relevant. Most of the motions pending before this Commission are motions on purely legal matters. It is the function of the written motion to define the law as it applies to one's case and to then supplement this written motion with oral argument that can also be responsive to any particularized questions of the finders of law. Expert witnesses are not needed for this purpose. To the extent that experts in the field have written on an issue that is the specific subject of a motion, that article can be cited and even appended to the motion. If the legal-expert has experience and understanding of the subject matter of the motion but has not written specifically on the topic, that expert can be approached as a consultant to a party and can help construct the brief and the oral argument

The Defense has clearly demonstrated their capability to argue their legal theories. There appears to be a great danger in permitting this expert testimony. The Defense in their witness request for Professor Ackerman stated his views are “authoritative on the questions raised in these motions” and “there is simply no greater authority in the world . . . when it comes to these questions.” It is clear that the Defense sees this expert serving in a quasi-judicial function, not allowed in any court of law, court-martial, or military commission. This statement alone shows the danger that this witness may usurp the authority of the Commission in determining what the law is.

Finally, while we appreciate the Defense's concern that the Commission may need further assistance in understanding the law beyond the initial arguments that the counsel assigned to this case can provide, we do not feel that using the Defense's hand-picked experts are the solution. In voir dire, the Presiding Officer stated that should questions of the Commission desire greater assistance in understanding a question of law, he would permit counsel for both sides to present their views on the matter to the Commission to assist in getting the Members the additional help they desire. (Transcript page 23). Defense stated in voir dire that the Commission members will have to carefully study "international treaties, the customs and practice as established by military regulations, handbooks, and international cases throughout the world, as well as the Constitution of the United States, federal judicial opinions and federal statutes." See Hamdan transcript, page 42. Defense asked if the members were up to the task and they replied that they were. Until such time as the members claim to be unable to determine the law despite reading of the parties' briefs, hearing the parties' oral argument, and conducting their own research, expert testimony is neither relevant nor helpful.

3. Response to paragraph 4. The Prosecution has no objections or supplements to this paragraph.
4. Response to paragraph 5. The Prosecution has no objections or supplements to this paragraph.
5. Response to paragraph 6. The Defense asserts that Professor Ackerman is available to testify live at Guantanamo Bay, Cuba on 10 November 2004. While we do not know the travel availability of Professor Ackerman, we do note that there is a normal three day turnaround for ingress and egress from Guantanamo.
6. Response to paragraph 7. To the extent that the Prosecution's response to paragraph 3 contains arguments on both relevance and the need for this witness to testify live, that response is hereby incorporated. Additionally, the Defense provides no reasons why testimony by this witness, if allowed, could not be taken by telephone or video teleconference (VTC).
7. Response to paragraph 8. The Defense states that no other witness can be called because Professor Ackerman is the "leading" scholar in these fields. Suffice it to say that even if Professor Ackerman is the "leading" expert in his field, he is not the only expert.
8. Response to paragraph 9. Paragraph 9 of the Defense request is not compliant with POM 10. POM 10, paragraph 4i requires that the Defense state the law that requires the production of this witness. Furthermore, failure to contemplate all the questions that the Commission may ask (the Defense assertion as to why he must testify in person), does not logically make sense in relation to why he could not testify over the phone or by video teleconferencing. In relation to this reason there does not appear to be any difference based simply on the mode used to provide the testimony.

9. Conclusion. The Prosecution has a motion pending before the Commission, the decision of which would affect the production of this witness. Therefore, the Prosecution requests that the Commission defer its ruling on this issue until the Motion is decided. If the pending Motion is decided in favor of the Defense, the Prosecution still requests that the production of this witness be denied. From the proffer, it is clear that the Defense had consulted with the witness and has obtained the value of her input. If they have not used this value in their motions to date, they can do so in their replies¹ or in oral argument. While live “law expert” witness testimony may add to the media attention dedicated to these proceedings, there has been no showing as to why the briefs and oral arguments of the parties assigned to this case are insufficient.

XXXX
Commander, U.S. Navy
Prosecutor

¹ On 21 October, the Defense requested a delay in filing replies to the Prosecution’s responses to their motions. They now have plenty of time to incorporate whatever they have learned from these experts into their replies.

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)	DEFENSE REPLY TO
UNITED STATES OF AMERICA)	PROSECUTION RESPONSE TO
)	DEFENSE REQUEST FOR
v.)	WITNESS: BRUCE ACKERMAN
)	
SALIM AHMED HAMDAN)	27 October 2004
)	
)	
)	
)	
)	

1. Reply regarding paragraph 3. The prosecution continues its blatant attempt to hide relevant law, as well as testimony about the history of the law, from the commission through this legal maneuver. The Defense has explained, in detail, precisely why the witness' *testimony* will be relevant. We have detailed precisely why this commission must hear from Professor Ackerman, insofar as he is the foremost expert on the American Constitution, and the meaning of the Constitution throughout American history in a time of armed conflict.

As the supplemental material makes clear, Professor Ackerman has published work that bears on these questions, but has not applied that work to this specific prosecution. That is the function of his testimony, and for this reason, merely incorporating his past work into a defense brief of some kind would not be appropriate. Indeed, everyone would expect that a move like that would be resisted by the Prosecution precisely on grounds of relevance. And it makes absolutely no sense why testimony can be admitted in one form (like writing), but not another (live).

Incorporation of Professor Ackerman's work into a defense brief is inappropriate for a second reason, because he is not in any way a defense counsel. The whole function of experts about the meaning of the law is precisely to make sure that the relevant conclusions can be cross examined by both sides. Barring that testimony in lieu of some submission alongside a brief would make such examination impossible.

The Prosecution provides not a *single* case in which a mixed body of lawyers and nonlawyers has *ever* rejected expert testimony about the law. The Prosecution is simply making up a legal rule by taking precedents from other institutions when the very rules of evidence that govern *this* commission are different. Even under Federal Rule 702, which governs courts where the responsibility for deciding fact and law are separated, courts admit the testimony of law professors all the time. The prosecution cites irrelevancies about the *Yamashita* case and tries to make an argument about how expert testimony is not relevant. Nothing could be farther from the truth: the testimony goes to the very heart

of the motions being decided by the commission. And because this commission is the trier of both fact and law under the President's Order, the testimony is not only important, it is essential. It would constitute reversible error for the commission to proceed without it.

Unable to marshal even one case to support their bizarre contention, the Prosecution must resort to mischaracterizing the defense's request, asserting that somehow an expert will "usurp the authority of the Commission" and serve "a quasi-judicial function." Nothing could be further from the truth. The function of an expert is to illuminate the law and to explain the history behind it. It is NOT to decide it. In several previous filings with this commission, we have explained that the role of an Expert is confined in this way.

The prosecution is free to cross examine an expert witness, to explain why they believe the expert is wrong, and to present witnesses of their own in compliance with commission rules. But to say that the witness must be excluded because his views will decide the matter for the commission is not only premature, it is wrong. The testimony will do nothing more than explain his view of what the law is and why it looks that way. The commission is of course free to disregard the views of the expert at any point. That is precisely why, in voir dire, the Defense made sure that the commission was willing to hear arguments based upon international law. The fact that the Members have agreed to be willing to hear and decide these matters militates *for* the testimony (not against it, as the Prosecution contends in its papers), because it shows both the relevance of the testimony as well as the stated capability of the Commission to decide these matters.

2. Response to paragraph 6. No logistical difficulties with the transportation and testimony of the expert witness have yet arisen. The defense will deal with them at that time if they do so arise.

3. Response to paragraph 7. The defense has explained the relevance of the testimony, as well as why live testimony is greatly needed. Without live testimony, the impact of the witness will be much diminished, and the witness' ability to react to questions posed by both sides in the motion argument will be weakened considerably. The Defense did not ask for a delay in the Proceeding to accommodate the Professor's testimony and as such did not present alternatives.

4. Response to paragraph 8. The testimony of Professor Ackerman, as the leading expert on the American Constitution, is in no way cumulative with any other witness. Furthermore, the appropriate test is whether the expert has the expertise sought and whether the testimony is relevant to the subject, not whether he is the only possible expert. The defense notes that the Professor is not being paid for the testimony and as such whether a suitable alternative is available is not at issue.

5. Response to paragraph 9. The Defense request easily complies with POM 10. The defense has cited numerous cases where expert testimony has been admitted and been found helpful in helping the legal institution decide what the law is and why it looks

the way it does. To deny it would be in violation of the President's Order, which requires a "full and fair trial."

The defense agrees that the Prosecution's motion to preclude the testimony of the defense experts, if granted by the Commission as a whole, would be dispositive on the issue. Unless and until that occurs, however, there is no reason to prevent this testimony from going forward. Indeed, the Prosecution offers no explanation of how, if the Commission's full membership were to rule against the Prosecution's motion to preclude the testimony of the experts, there would be any basis to preclude Prof. Ackerman's production, particularly when the standard for testimony and evidence is probative to a reasonable person.

It is notable that the Prosecution seeks to enter, on the *merits*, evidence under this very evidentiary standard that would not be admissible in any court in America. It then, under the *very same standard*, tries to bar the Defense the opportunity to enter relevant expert testimony on a *motion*. This is a wrongheaded move, one can only taint the fairness of these proceedings.

Indeed, the failure to produce Prof. Ackerman when the Commission as a whole has not ruled on the matter is a calculated and clear attempt to influence the Commission's decision by requiring the Commission to delay the proceedings to obtain the testimony. Given that two of the Commission members remain responsible for their normal duties during the disposition of the Commission and that proceedings may only be heard in Guantanamo, delay requires these Commission members to suffer additional disruption in their work and personal lives if they were to rule in favor of the Defense. As such production of the witness is appropriate in order not to prejudice or appear to prejudice the Commission's decision.

6. Conclusion. The testimony of this expert is essential in giving the commission a fair picture about the complexity and history behind the issues being decided by the commission. Even the Prosecution has not provided a single precedent that *prohibits* the testimony of this expert. To the contrary, similar testimony is given in federal courts all the time. Indeed, the case for such testimony is far stronger here. Given the particular nature of (a) these claims and (b) this type of proceeding (commission composed of non-lawyers with a more lenient evidentiary standard) it is pragmatically advisable to let this expert testify.

Finally, the Defense insists that the full membership of the Commission rule on this matter in a written opinion with reasons. In particular, the opinion should address the following two questions in explaining why the witness will or will not be produced: Is this expert's testimony permissible under the rules of the commission? If not, how can such a decision can be squared with the permissive rules of evidence set by the President to govern these commissions and the fact that this is a mixed body to determine law and fact? It is unquestioned that the witness is an expert knowledge relevant to this commission's adjudication of matters before it.

We further request that this motion, and the government's response, as well as the final written decision by the full commission, be made public and part of the record in this case.

Neal Katyal
Civilian Defense Counsel

LCDR Charles Swift
Detailed Defense Counsel

From: XXXX. CIV (L)
Sent: Friday, October 29, 2004 3:02 PM
To: XXXX (L); 'Swift, Charles, LCDR, DoD OGC'; 'Neal Katyal'
Cc: XXXX, CDR, DoD OGC'; 'Swann, Robert, COL, DoD OGC'; XXXX, LtCol, DoD OGC'; XXXX; XXXX, COL, DoD OGC'; XXXX, Cpt, DoD OGC'; XXXX; XXXX, GySgt, DoD OGC'; 'Gunn, Will, Col, DoD OGC'; Brownback, Peter E. COL (L)

Subject: US v. Hamdan, Decision of the Presiding Officer, D26

United States v. Hamdan
Decision of the Presiding Officer, D26

The Presiding Officer has denied the request for production of Bruce Ackerman as a witness. The Presiding Officer did not find that he is necessary. See Military Commission Order 1, section 5H. Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

XXXX
Assistant to the Presiding Officers
XXXX
Voice: XXXX
Fax: XXXX

UNITED STATES OF AMERICA)	
)	
)	DEFENSE MOTION -
v.)	THE ENTIRE COMMISSION
)	TO GRANT PRODUCTION OF
)	WITNESS DENIED IN D 26
)	
HAMDAN)	BRUCE ACKERMAN
)	
)	October 29, 2004

The Defense previously requested that the above witness be produced. As the documents referenced below make clear, this expert is the leading American scholar of the Constitution and its meaning in wartime. Ackerman is Sterling Professor of Law, Yale Law School. The request for production of this witness was denied by the Presiding Officer under the provisions of Military Commission Order 1, section 5H.

The Defense requests the Commission direct the production of the witness, and that the Commission consider the following previously made filings, and the attachments thereto, per the Filings Inventory, in making its determination.

- a. Motion by the defense for the production of the above witness.
- b. Decision of the Presiding Officer denying the witness.
- c. The government response to this motion.
- d. The government reply to this motion.

The defense also renews its statement that this motion must be decided by the full commission, as per Section 4 (c)(2) of President Bush's Military Order dated 13 November 2001, and that the reasons for granting or denying the motion be specified in detail and in writing on the record.

By: _____
 Neal Katyal
 Civilian Defense Counsel